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GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: October 7, 2013



Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
GABRIEL TECHNOLOGIES CORP., et al.,) No. 13-30340DM
Debtors.) (No. 13-30341)
Chapter 11

MEMORANDUM DECISION REGARDING SECTION 305 SUSPENSION

I. INTRODUCTION

By Tentative Ruling Re Section 305 Suspension entered on September 9, 2013, (Docket No. 204), the court announced its tentative ruling to drop from calendar a hearing scheduled for September 10, on the motion by Qualcomm Incorporated ("Qualcomm") described below. It further promised the parties a written decision setting forth its consideration of the applicable factors in support of suspension, and an appropriate order.

Qualcomm, through counsel, reported that it would not seek to have the court withdraw its tentative decision. By this Memorandum Decision Regarding Section 305 Suspension, the court is setting forth in detail its reasoning for suspending these cases and is concurrently entering its Order Suspending Cases Under Section 305.

1 II. DISCUSSION

2 A. Background

3 Gabriel Technologies, Inc. ("Gabriel") was founded in 2003,
4 and is a publicly traded corporation. Its subsidiary, Trace
5 Technologies, LLC ("Trace" and with Gabriel, "Debtors") holds
6 intellectual property assets involved in products using global
7 positioning systems. Trace acquired the assets of Locate
8 Networks, Inc., including rights and interests that that company
9 maintained under a license agreement with SnapTrack, Inc.

10 In 2002 Qualcomm acquired SnapTrack, Inc. Gabriel and Trace
11 contend that various trade secrets and patents acquired in
12 connection with that acquisition were derived from or identical to
13 intellectual properties they owned.

14 They commenced an action against Qualcomm and other
15 defendants in the United States District Court for the Southern
16 District of California (the "District Court") in October, 2008.
17 In the complaint they alleged misappropriation of trade secrets,
18 breach of contract, fraud and other claims.

19 Extensive and expensive litigation ensued and was not
20 favorable to Gabriel and Trace as Qualcomm obtained partial
21 summary judgment on March 13, 2012, and then final summary
22 judgment on September 28, 2012, (the "Qualcomm Judgment").
23 Thereafter Qualcomm obtained a Fee Order granting Qualcomm and the
24 other defendants an award of attorneys' fees of \$12,401,014.51,
25 against Gabriel and Trace plus a significantly lesser amount
26 against their local counsel.

27 Gabriel and Trace filed timely notices of appeal of the
28 Qualcomm Judgment and the Fee Order. Those appeals ("the

1 Appeals") are now pending in the United States Court of Appeals
2 for the Federal Circuit (the "Federal Circuit"). They have filed
3 their opening briefs and Qualcomm is expected to file its
4 appellee's briefs shortly. Both sides agree that the Appeals are
5 likely to be argued early in 2014 and that a decision is likely to
6 be handed down by the Federal Circuit around mid-2014.

7 Even before the District Court action was commenced, Gabriel
8 and Trace began to experience financial reverses. They had ceased
9 filing audited financials after fiscal year 2006 and as early as
10 July, 2007, they began borrowing funds largely to finance the
11 District Court action under a series of financings that are
12 complex and spanned several years, culminating in a September,
13 2011 Note Purchase Agreement by which nearly all of their present
14 secured and unsecured debt (other than the Fee Award) was either
15 incurred or refinanced from the prior financings. By and large
16 the creditors of Debtors who are dealt with in their proposed Plan
17 are various participants in those financings; there is also
18 general unsecured debt, unpaid professional fees, and Qualcomm's
19 multi-million dollar Fee Award.

20 B. Procedural History

21 Debtors filed their voluntary Chapter 11 petitions on
22 February 14, 2013. By Order entered on February 26, 2013 (Docket
23 No. 19), the court ordered the joint administration of these two
24 cases.

25 On April 3, 2013, Qualcomm filed a motion to convert these
26 cases to Chapter 7 or for appointment of a Chapter 11 Trustee.
27 The court held a hearing on that motion on May 17, 2013, and on
28 May 28, entered a Memorandum Decision and a companion Order

1 Denying Motion For Conversion To Chapter 7 or Appointment of a
2 Chapter 11 Trustee. In that Memorandum the court anticipated that
3 Debtors' plan of reorganization might not be confirmable and that
4 Qualcomm was likely to object to confirmation. It stated further,

5 . . . if Debtors do not obtain confirmation within the
6 timetable to be set, Qualcomm will have its wish, albeit
7 under § 1112(b)(4)(J) (a failure to file a disclosure
statement, or to file or confirm a plan, within the time
fixed . . . by order of the court.)

8 Debtors filed their Amended Chapter 11 Plan (the "Plan") on
9 June 7, 2013 (Docket No. 119) and a proposed Disclosure Statement
10 on the same date (Docket No. 120).

11 At a June 10, 2013, status conference the court established a
12 briefing schedule for consideration of the Plan and Disclosure
13 Statement, and directed Qualcomm to file any motion seeking
14 recharacterization of certain claims in this case by a deadline.

15 Qualcomm filed its Motion For Determination Of Threshold
16 Issues Relating To Plan Confirmation (Docket No. 145) (the
17 "Recharacterization Motion") on July 1, 2013. In the
18 Recharacterization Motion Qualcomm argued that a vast majority of
19 Debtors' lenders are in fact equity holders and that even if any
20 of them hold true obligations, no payments were due to them as of
21 the date of Debtors' Chapter 11 petition. It stressed that
22 Debtors are out of business and that their only hope for any
23 recovery is to prevail on the Appeals and thereafter on a
24 subsequent retrial of the District Court action.

25 Indeed, in reviewing the Recharacterization Motion, it is
26 apparent that virtually all of Debtors' creditors (except
27 Qualcomm) and Debtors' professionals, expect payment, if at all,
28 not from any future business operation of Debtors, but rather

1 solely from ultimate success in the District Court action.

2 Qualcomm contends that those creditors really hold "Investor
3 Claims" that should be treated as equity, and thus subordinated to
4 legitimate creditors. Qualcomm is far and away the major
5 "legitimate" creditor of this case. Thus it contends that the
6 court should deny confirmation of Debtors' Plan outright.

7 In opposition to Qualcomm's Recharacterization Motion, and to
8 support its own revised Plan and Disclosure Statement, Debtors
9 argued that the court should confirm the Plan promptly even though
10 the only likely recovery under any circumstances (other than some
11 relatively minor matters) would be success on the Appeals and
12 thereafter further success in a renewed District Court action.

13 In other words, Confirmation would not itself facilitate any
14 present reorganization or effective liquidation. It would simply
15 fix certain of the parties' rights and obligations while the
16 Appeals go forward.

17 C. Court Suggestion of Suspension of the Case

18 From the court's point of view, as expressed specifically at
19 the July 30, 2013 hearing, an enormous amount of expense and
20 effort has already gone into the preparation and presentation of,
21 as well as the opposition to, the Recharacterization Motion and
22 the Plan. To decide the Motion is not simply a "yes" or "no"
23 matter, because there are so many classes of creditors that
24 Qualcomm lumps together under its Investor Claim label. Each
25 class, if not each member of the class, might have to be
26 considered separately.

27 To deal with confirmation issues would also involve more
28 briefing and arguments, and seems premature and unnecessary at

1 present since the outcome of the Appeals is so critical to the
2 ultimate disposition of these cases, whether they are prosecuted
3 by Debtors as Chapter 11 debtors in possession, or by a trustee
4 either in Chapter 7 or Chapter 11.

5 Stated more simply, if the Appeals are resolved favorably to
6 Qualcomm with affirmance of the decisions by the District Court,
7 then Debtors have nothing left but liquidation in Chapter 7 with
8 no expectation of any meaningful recovery for creditors.¹ They
9 have acknowledged as much already.

10 Because the court envisioned an enormous waste of resources,
11 both the parties' and its own, when the ultimate outcome of these
12 cases is so dependent upon the final resolution of the Appeals,
13 the court asked the parties to brief whether or not suspension
14 under § 305 would be appropriate.² Having raised the issue of
15 suspension, the court is not unmindful of the fact that it entered
16 a Stipulated Scheduling Order on June 20, 2013 (Docket No. 130),
17 that set forth a schedule for a consideration of Debtors' Plan and
18 Disclosure Statement and Qualcomm's Recharacterization Motion.

19 _____
20 ¹ As an aside, some parties believe that Debtors have causes
21 of action against their former officers and directors who chose to
22 initiate the District Court action in the first place. Of course,
23 if the Appeals are successful, it is inconceivable that those
24 directors and officers have any liability; if the Appeals are
25 unsuccessful, then maybe there is some right of recovery against
26 some directors or officers or their insurers. That speculative
27 outcome is not relevant to the decision to suspend and is
28 obviously for another day.

25 ² 11 U.S.C. § 305 provides, in part:

26 (a) the court, after notice and a hearing, may dismiss a
27 case under this title, or may suspend all proceedings in a
28 case under this title, at any time if -

(1) the interest of creditors and debtor would be
better served by such dismissal or suspension. . . .

1 And further, that stipulated order suggested that at a hearing on
2 July 30, 2013, the court would consider deadlines for transmittal,
3 voting, discovery and briefing on the confirm ability of Debtors'
4 Plan.

5 By virtue of the sua sponte suspension possibility, the court
6 admittedly has redirected the parties' attention from what they
7 originally expected to be a hard-fought contest over whether or
8 not numerous claims could be recharacterized as equity and whether
9 or not Debtors' Plan could be confirmed. But now that the parties
10 have weighed in on the question of suspension, the court in its
11 discretion believes it far more appropriate to suspend these
12 Chapter 11 cases (with exceptions noted below) and await the
13 disposition of the Appeals.

14 D. Factors Applicable To § 305 Disposition

15 Section 305, entitled Abstention, permits the court to
16 dismiss or suspend a case under the Bankruptcy Code. In this
17 court's experience, dismissal is the typical option and suspension
18 rare.³ More importantly, a decision under § 305 is subject to
19 limited appellate review and therefore is a power that should be
20 utilized only under extraordinary circumstances. In re Eastman,
21 188 B.R. 621 (9th Cir. BAP 1995); In re Paper One Partners, LP 283
22 B.R. 661, 678 (Bankr. S.D.N.Y. 2002). But the fact that a
23 decision under § 305 is only subject to review by the district
24 court or the Bankruptcy Appellate Panel does not mean that this
25 court should not make a decision under that section to suspend

27 ³ "Abstention", a word present in the caption, does not even
28 appear in the statute itself, unlike that option in 28 U.S.C.
§ 1334(c).

1 rather than dismiss where appropriate. The statute plainly
2 directs the court to dismiss or suspend if the interest of
3 creditors and the debtor would be better served by dismissal or
4 suspension. Eastman, 188 B.R. at 624.

5 Nor is § 305 available only in involuntary cases, such as two
6 recent notable decisions in the Ninth Circuit, In re Marciano, 459
7 B.R. 27, 47 (9th Cir. BAP 2011), aff'd, 708 F.3d 1123 (9th Cir.
8 2013), and In re Macke Int'l Trade, 370 B.R. 236 (9th Cir. BAP
9 2007). The availability of that section for voluntary cases was
10 summarized in In re Monitor Single Lift I, Ltd. (Bankr. S.D.N.Y.
11 2008) 381 B.R. 455, 464:

12 Moreover, the case law interpreting § 305(a)(1), while
13 dominated by cases concerning involuntary petitions filed by
14 creditors, is not limited to this situation. Courts have also
15 abstained pursuant to § 305(a)(1) based upon the absence of a
16 proper purpose for filing a bankruptcy, In re Duratech
17 Indus., Inc., 241 B.R. 291, 300 (Bankr.E.D.N.Y.1999)
18 (dismissing bankruptcy where the petition was filed to affect
19 the outcome of a two-party dispute between the debtor and one
20 creditor in state court, and where resolution of the
21 bankruptcy depended entirely on the outcome of the state
22 court proceeding); where questions of state law needed to be
23 resolved by the district court before a bankruptcy could
24 proceed, In re Milestone Educ. Inst., Inc., 167 B.R. 716
25 (Bankr.D.Mass.1994) (suspending proceedings before bankruptcy
26 court pursuant to § 305(a)(1) to allow district court to
27 first resolve novel issues involving receivership law, as
28 doing so was in the interest of debtors and all creditors);
and where a bankruptcy was filed in response to a two-party
dispute between a debtor and a single creditor. In re Spade,
258 B.R. 221 (Bankr.D.Colo.2001) (dismissing involuntary
chapter 7 petition when creditor conceded that the bankruptcy
petition was used mainly as a strategy to more easily obtain
discovery, after debtor had resisted discovery in a state
court action filed by the same creditor to collect on a
guaranty); see also 2 Collier on Bankruptcy ¶ 305.02[2]
(noting that "[w]hile these courts are correct that fact
patterns satisfying the three-part test [for dismissal of an
involuntary proceeding] undoubtedly justify abstention,
section 305(a)(1) is not so limited and additional fact
patterns may warrant abstention"). Therefore, while reasons
for abstaining may be less common in voluntary cases than in
involuntary bankruptcies filed by creditors attempting to
gain leverage over the debtor, this does not foreclose the

1 possibility that a § 305(a)(1) motion will be granted in a
2 voluntary case.

3 Thus suspension or dismissal is clearly available on
4 voluntary petitions, and "suspend" cannot mean the same as
5 "dismiss".

6 The Bankruptcy Appellate Panel in the Marciano case,
7 affirming a court's refusal to dismiss an involuntary petition,
8 revisited the traditional factors to be considered in a § 305
9 decision, previously set forth in Monitor Single 381 B.R. at 464-
10 5. The applicable factors here are:

- 11 • Economy and efficiency of administration;
- 12 • Whether another forum is available to protect the interests
13 of both parties where there is already a pending proceeding
14 in state court;
- 15 • Whether federal proceedings are necessary to reach a just and
16 equitable solution;
- 17 • Whether there is an alternative means of achieving an
18 equitable distribution of assets;
- 19 • Whether the debtor and creditors are able to work out a less
20 expensive arrangement;
- 21 • The purpose for which bankruptcy jurisdiction has been
22 sought.

23 As noted in the statute, the overriding considerations are,
24 of course, the interests of creditors and the debtor. Plainly,
25 Qualcomm opposes any disposition under § 305 and prefers to have
26 the Recharacterization Motion decided in its favor. Against that
27 position, however, are the wishes of the Debtors and the Official
28 Unsecured Creditors' Committee. The court does not count votes to

1 decide this issue but weighs the competing interests of the
2 various creditor constituencies and the Debtor, and then applying
3 the applicable factors to the peculiar circumstances of any
4 individual case, exercises its sound discretion to make a decision
5 for or against suspension or dismissal.

6 Here, the overwhelming interests of creditors generally
7 support suspending these Chapter 11 cases and letting the Appeals
8 run their course. If Qualcomm wins there are not many options
9 left for Debtors and if Debtors prevail, the court can revisit the
10 future conduct of these cases.

11 E. Application of the § 305 Factors

12 Turning more specifically to the most applicable factors,
13 they all weigh in favor of suspension rather than either dismissal
14 or continued prosecution of these cases at present.

15 1. Efficiency of administration.

16 A great deal of time and effort has gone into Qualcomm's
17 preparation of its motion to convert, Debtor's opposition, oral
18 argument, the court's Memorandum Decision, and Qualcomm's
19 unsuccessful attempt to appeal denial of that motion, followed by
20 a similarly enormous effort on both sides for preparation and
21 opposition to the Recharacterization Motion and for and against
22 confirmation of a Plan. That is all in the past and the expense
23 cannot be recouped.

24 The time has now come to be more economical and efficient,
25 avoid unnecessary judicial involvement, minimize further briefing,
26 and possibly extensive and uncertain follow-up hearings to decide
27 which, if any, of the many holders of "Investor Claims" should be
28 treated as equity. Similarly, consideration of debtor's Plan and

1 Disclosure Statement in the context of a costly and uncertain
2 confirmation battle makes no sense at this time. As noted above,
3 if the Appeals are adverse to Debtors, then all of that unexpended
4 and expensive time and effort is avoided and efficiency will
5 prevail.

6 2. Alternative Forum.

7 The Federal Circuit is not an alternative forum to the
8 bankruptcy court for a solution to Debtors' financial woes, but it
9 plainly is the only forum presently available to dispose, once and
10 for all perhaps, of Debtors' disputes with Qualcomm. Stated
11 otherwise, the obvious option for Debtors if the Appeal is
12 adversely decided is to convert this case to Chapter 7. Allowing
13 the matter to play out in that alternative forum, at least until
14 mid-2014, is not only consistent with the concept of efficient
15 administration, but is where the principal disputes will possibly
16 end.

17 3. Necessity of Federal Proceedings.

18 If the Appeals are adverse to Debtors, Qualcomm's victory
19 will be assured and its desire to have Debtors' cases converted to
20 Chapter 7 will most likely be fulfilled. Then it will remain for
21 a trustee to realize what other assets might be available to share
22 among various classes of creditors, of which Qualcomm is clearly
23 the largest. Then this court and these bankruptcy cases will
24 serve the needs of all parties.

25 4. Alternative means.

26 There really does not seem to be an alternative means to this
27 bankruptcy case (after the disposition of the Appeals) for an
28 equitable distribution of assets. If the Fee Award survives the

1 Appeals, Qualcomm will get the lion's share of what ever value is
2 left after payment of valid secured and priority claims and
3 Chapter 7 expenses of administration. This is the proper forum,
4 sometime in the future, to resolve the competing priorities of
5 creditors' claims consistent with the scheme of the Bankruptcy
6 Code.

7 5. Less expensive alternative arrangement.

8 Were Debtors and Qualcomm to resolve their differences
9 consensually, it may well be that the remainder of Debtor's claims
10 could be resolved outside of the bankruptcy court. While that
11 outcome might be an aspirational goal of the court, the long
12 history of determined and hard-fought litigation between them does
13 not suggest that such an end game is likely.

14 6. Purpose for seeking bankruptcy jurisdiction.

15 The court believes the Debtors' purposes in filing bankruptcy
16 were proper, and even Qualcomm did not seek dismissal of the cases
17 other than as an option under § 305. As stated above, if the
18 Appeals go against Debtors, the likely course of these cases is
19 liquidation ibn Chapter 7. If the Appeals go against Qualcomm,
20 the court will need to revisit the future of these cases then.

21 F. Activities During Case Suspension

22 Debtors have filed an application to compromise an existing
23 controversy that is set for hearing later this month. Because the
24 terms of that compromise were negotiated prior to the court's
25 suggestion of suspension, it would be unfair to the parties to
26 that compromise to refuse to consider it prior to mid-2014.
27 Accordingly, and notwithstanding the order being entered with this
28 Memorandum Decision, the court will dispose of that matter as

1 appropriate.

2 Further, while Debtors should not need the assistance of
3 counsel or of professionals other than its appellate counsel, it
4 would be unfair to refuse to consider any request for employment
5 of professionals that might come up under §§ 327 or 328 of the
6 Bankruptcy Code. Thus any such matters (excluding requests for
7 compensation) will not be suspended.

8 In addition, Debtors still have basic administrative
9 responsibilities of filing monthly operating reports and paying
10 United States Trustee fees. Those activities will continue
11 notwithstanding the suspension.

12 Finally, the court cannot rule out some unforeseen
13 circumstance that might require it to attend to something such as
14 permission to file a late claim, a motion for relief from stay by
15 someone not previously involved in the case, or some similar
16 routine matter. If and when such arise, the court will decide
17 then, on a case by case basis, whether to consider them.

18 III. CONCLUSION

19 For the foregoing reasons the court will suspend these
20 Chapter 11 cases until the Appeals have been decided by the
21 Federal Circuit. Within thirty days after a decision on the
22 merits is rendered (whether or not there is any request for
23 reconsideration or a petition for certiorari is filed), Debtors
24 are to set a status conference through the court's courtroom
25 deputy, give notice of that status conference to Qualcomm, the
26 Creditors' Committee and other parties who have requested notice,
27 and to file a status conference statement at least fifteen days
28 prior to that hearing.

1 The court is concurrently entering its Order Suspending Cases
2 Under Section 305.

3 **END OF MEMORANDUM DECISION**
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